

REFGOV

Reflexive Governance in the Public Interest

Fundamental Rights

**FUNDAMENTAL RIGHTS AND THE TRANSFORMATION OF
GOVERNANCE
IN THE EUROPEAN UNION**

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I. Introduction

It has been argued in many places, and in different forms, that the establishment between the EU Member States of an internal market, and now of an area of freedom, security and justice, requires the European Union to legislate in the field of fundamental rights, either in order to avoid a form of regulatory competition between the Member States, or in order to ensure mutual trust allowing for mutual cooperation between judicial, police and administrative national authorities. ‘Negative integration’, in the form of the lowering of barriers to the movement of goods, services, persons and capital, or in the form of mutual recognition of judicial decisions or exchange of information between national authorities, should thus be followed with, or compensated by, ‘positive integration’, in the form of the setting of common standards applicable throughout the EU Member States. The EU Charter of Fundamental Rights, moreover, provides the baseline from which to act, since it represents a set of values which all the Member States have agreed to consider as fundamental. The question (so it would seem) is now that of implementing the Charter, by using the legal bases provided for in the treaties to the fullest extent possible.

This paper argues in favour of an alternative approach. It does not question that, in certain fields, the harmonisation of fundamental rights throughout the EU Member States might be required, and that the adoption of legislative instruments, in particular directives or framework decisions, may be justified. But reliance on the tool of legislation may be both too ambitious and too modest. It may be too ambitious, either in the sense that it is politically unrealistic, or because it presumes our ability to identify how best to implement fundamental rights, while, in most cases, both the political will and a clear understanding of what is required are missing. And it may be too modest, because it does not allow any action to be adopted beyond the areas where powers have been attributed to the Union,¹ and because it does not answer the question of how to identify the need for the Union to take action in this field.

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¹ In this article, unless otherwise specified, the expression ‘European Union’ will be used in the generic sense, to refer to both the European Union and the European Community, which technically of course are different international organisations, although they share common institutions.

Therefore, in exploring how the future fundamental rights policy of the European Union may be improved, this paper seeks to take into account two requirements, which are the reverse of these limitations to an approach insisting on implementing fundamental rights through legislative harmonisation. First, the approach proposed here is not one based primarily on the need to impose certain limits on public action in the name of human rights; it insists, rather, on the need to identify the tools which will ensure that human rights are effectively realised. The more we move from *ends* – defined as the negative obligation not to violate rights – to the search for the *means* through which to achieve these ends, implying the imposition of positive obligations,² the less we know what human rights require; and the more, therefore, fundamental rights policy is about learning, and about improving upon what we think we know. This redefinition may also be described as a move from substance to procedure: since there is uncertainty about how to improve the protection of fundamental rights (beyond the minimum requirement not to violate them), a fundamental rights policy should be about devising adequate mechanisms for the constant testing of the policies pursued in different settings, in order to arrive at a better understanding of how to best achieve their objectives. This task (identifying the means, rather than defining the ends) is one for which bodies other than courts may be best suited; while the courts are well equipped to identify instances of violations of rights, they are much less capable of solving problems of a structural or multipolar nature, requiring account to be taken of a broader set of factors than those usually presented to the courts in classical adjudication. Therefore, the identification of the means by which to effectively realise human rights might be better entrusted to parliamentary bodies, aided by experts, than to courts when faced with specific instances where human rights are violated.

Second, the approach proposed in this paper takes into account the fact that, in certain cases, initiatives may be required in fields in which the Member States have not attributed competences to the European Union – but where there exists, nevertheless, a need for improved coordination, and where the added value of the Union intervening may be undeniable.

The approach of this paper is therefore procedural, rather than substantive: rather than asking the classical question of which initiatives need to be taken by the Union, it argues in favour of the establishment of a mechanism which would ensure a form of permanent learning between the Member States, in order to encourage progress in the direction of the further realisation of fundamental rights as recognised in the Charter, irrespective of whether this takes the form of legislative developments at the level of the Union. What is advocated here has already been experimented with in certain areas – such as health care, the rights of the child, or, to a limited extent, asylum and immigration. This article asks whether this should be generalised, and become a permanent component of governance in the EU. The establishment of the Fundamental Rights Agency could constitute a unique opportunity to launch a fundamental rights policy thus conceived.³ During the discussions leading up to the establishment of the Agency – in the period

² There is an important difference between defining the limits which, if they are crossed, will result in violations of rights, on the one hand (the end to be achieved), and the choice of how to arrive at a situation where rights are fully respected, on the other hand (the means). It is relatively easy, for instance, to identify the cases in which freedom of expression is threatened by the excessive concentration of the media; how to ensure the pluralism of the media and a sufficient diversity in the viewpoints presented to the public may be more delicate. Similarly, while we may agree on limits beyond which there will be prison overcrowding threatening the right of detainees not to be subjected to inhuman and degrading treatment or punishment (in terms, for instance, of the number of prisoners per available square metre), how to reform criminal policy and the management of prisons in order to avoid such overcrowding may be less evident.

³ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, p. 1.

from December 2003, when the European Council first decided to transform the Vienna EU Monitoring Centre on Racism and Xenophobia⁴ into a Human Rights Agency, to the final agreement on the Regulation establishing the Agency in February 2007 – many advocated that the Agency should take the form of a courthouse, or an ombudsinstitution writ large, roughly equivalent to the Council of Europe’s Commissioner for Human Rights. This paper tries to show why the Fundamental Rights Agency should actually resemble a specialised think tank or a research body. It envisions the future of fundamental rights in the European Union as based on a view of rights as having to be permanently reinvented in the new settings in which they are invoked, and as objectives (or ‘values’), the fulfilment of which requires a permanent learning process, both (horizontally) between the Member States and (vertically) between the institutions of the Union and the Member States.

The Impact Assessment Report appended to the Proposal justifies the establishment of the Agency by the finding that: ‘Although the Member States have developed various strategies, policies and mechanisms to respect and mainstream fundamental rights when implementing Union law and policies, there is a lack of systematic observation of how the Member States do this. Such a lack represents a missed opportunity, as the potential for sharing of experiences and good practices and mutual learning is not met’.⁵ Why such mutual learning is needed, how it might be carried out, and what tools might be used for this purpose, is what this paper seeks to address.

We cannot understand why a fundamental rights policy should be based on collective learning without first describing the position of fundamental rights in the current constitutional scheme of the Union. In the second part of this paper, a distinction is proposed between two functions fundamental rights fulfil in the EU legal order. While they are traditionally conceived as limits imposed on the EU legal order, fundamental rights could also be seen as having the ‘positive’ function of guiding the exercise of the competences attributed to the Union, thus giving rise to a fundamental rights policy of the Union. This paper argues that this ‘positive’ function of fundamental rights has become crucial, since the level of protection of fundamental rights in the EU Member States can be affected not only by the adoption of certain acts by the Union, but also by the absence of any intervention of the Union in certain fields where the Member States have become *de facto* interdependent. This poses a specific challenge where the interdependency of the EU Member States limits their ability, in effect, to ensure a high level of protection of fundamental rights (Part II).

Part III then examines whether the response of the European Court of Justice to this challenge has been satisfactory. It presents both the important contribution of the Court to the protection of fundamental rights in the EU legal order, and the difficulty facing the Court in adequately protecting the Member States from the pressures resulting from their membership of a common area shared with the other Member States with different fundamental rights standards and traditions. Part IV then reviews three areas where an answer to this challenge has been sought in mechanisms seeking to ensure a monitoring both of the impact of EU law on the EU Member States and of developments within each Member State which may affect other Member States: the examples are chosen from the fields of health care, asylum and immigration, and the rights of child. The final part, Part V, concludes that the establishment of the Fundamental Rights Agency may represent a unique

⁴ This Monitoring Centre, sometimes referred to as the Vienna Observatory, was created by Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151, 10.6.1997, p. 1 (since amended by Regulation (EC) No 1652/2003, OJ L 245, 29.9.2003, p. 33).

⁵ SEC(2005)849, of 30.6.2005, at p. 8.

opportunity to move beyond the dichotomy between hierarchy (the adoption of EU legislation, where legally and politically feasible) and markets (in the absence of any coordination between the EU Member States when they implement fundamental rights in their own fields of competence) in the development of a much-needed fundamental rights policy of the European Union.

II. Two functions of fundamental rights in the EU legal order

Fundamental rights have classically fulfilled a purely ‘negative’ function in the legal order of the European Union: they have been limits imposed on the institutions of the Union, or on the Member States’ authorities in the field of application of Union law. When they were initially recognised by the European Court of Justice as part of the general principles of European Community law,⁶ they were used to ensure that the supremacy of EC law over national law would not be questioned by national courts in the name of their obligation to guarantee fundamental rights listed in national constitutions.⁷ Today still, fundamental rights are primarily seen as fulfilling this ‘shield’ function: while they restrict both the European legislator and the national authorities acting under EU law, they are not in any way conceived of as objectives which the European legislator should seek to achieve, or as having an impact on the allocation of competences between the EU and the Member States.⁸ The growth of EU Law should not lead to violations of fundamental rights, and in that sense these rights must be complied with in its development; but the progress of EU Law should not, in principle, be made dependent on the need to realise fundamental rights.

In contrast, fundamental rights would be fulfilling a ‘positive’ function in the EU legal order if they were to constitute not only an external limit on what the European legislator can do, but also an objective to be achieved by the European legislator. In this alternative conception, if fundamental rights had to be realised proactively, instead of having no influence on the exercise of the powers attributed to the Union, they would have to guide the exercise of such attributed powers.⁹

There are signs that fundamental rights are now being recognised as having this new, more proactive, function. This can be seen in The Hague Programme, appended to the European Council’s conclusions adopted in Brussels on 4 and 5 November 2004. Referring to the incorporation of the Charter into the Constitutional Treaty and the accession of the Union to the European Convention on Human Rights, the European Council stated that these developments ‘will place the Union,

⁶ Case C-29/69, *Stauder v Ulm* [1969] ECR 4119; Case C-11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; Case C-4/73, *Nold v Commission* [1974] ECR 491; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case 5/88, *Wachauf v Germany* [1989] ECR 2609.

⁷ See the decisions of the German Constitutional Court (Bundesverfassungsgericht) in *Solange I* [1974] 2 *CMLRev* 540 and *Solange II* [1987] 3 *CMLRev* 225, as well as the *Bananas II* Judgment, Order of 7 June 2000 2 BvL 1/97 or 53 *Neue Juristische Wochenschrift* 3124 (2000). The *Corte costituzionale* in Italy also threatened not to recognise the primacy of EC law where this would risk infringing fundamental rights listed in the Italian Constitution: see *Frontini v. Ministero delle Finanze* [1974] 2 *CMLRev* 372; Dec. 170 of 8 June 1984 in *SpA Granital v. Amministrazione delle Finanze* and *SpA Fragd v. Amministrazione delle Finanze*, Dec. 232 of 21 April 1989 (1989) 72 RDL.

⁸ See, for an excellent discussion of the relationship between the protection of fundamental rights and the question of competences, P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’, (2002) 39 *CMLRev* 945.

⁹ In favour of such a development, see O De Schutter, ‘Les droits fondamentaux dans le projet européen. Des limites à l’action des institutions à une politique des droits fondamentaux’, in O De Schutter and P Nihoul (eds), *Une Constitution pour l’Europe. Réflexions sur les transformations du droit de l’Union européenne* (Bruxelles, Larquier, 2004) 81.

including its institutions, under a legal obligation to ensure that in all its areas of activity, fundamental rights are not only respected *but also actively promoted*.¹⁰

But it is also a result of the dynamics of European integration that these ‘negative’ and ‘positive’ functions cannot be easily separated from one another, for EU law does not simply occupy certain fields, while leaving other fields to the Member States. This would imply that both normative domains are separated by a shifting, yet at any point in time clearly identifiable, borderline.¹¹ Instead, the development of EU law has an impact not only on the areas it has regulated, but also on the areas it has not (yet) colonised.

However, in this second situation the means by which EC law has an impact are different. In fields which EU law has not pre-empted, we have no rules (regulations, directives, etc) imposed from above; instead, States are ‘free’ to choose which national rules to adopt. However, this ‘freedom’ is severely constrained by the fact that, between the Member States, freedom of movement of capital, services, goods and persons is progressively being ensured, and that judicial, police and administrative authorities are increasingly cooperating with one another. Where the EU has not occupied the field by the imposition of legal rules, it does so, less visibly, but sometimes just as effectively, by creating interdependencies between States that the States deserve to be called ‘semi-sovereign’.¹² Indeed, the much-cherished ‘autonomy’ States claim may be, in many cases, more illusory than real: instead of this autonomy being constrained by common rules set at European level, it will be constrained by regulatory competition *between* States, rather than regulation imposed upon them. Formally, the EU Member States are free to take action; in fact, however, they cannot ignore, before taking action, the impacts of their action, and where such impacts depend on the attitude of all the other States with whom they share a common area, they may in fact have very few options left open.

We may therefore say that the EU has two tools to achieve its objectives: one is to act, and to impose a common legal regime on its Member States; the other is to remain passive, and to let things develop on the basis of a decentralised approach to solving problems. Whether the EU Member States are more ‘autonomous’ under the former or the latter approach is an empirical question, at least if we rely on a measure of autonomy which is not purely formal, and defined as a function of

¹⁰ *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, Annex I to the Conclusions of the Brussels European Council of 4-5 November 2004, EU Council doc. 14292/04, para. 2 of the general orientations.

¹¹ That is not to say that where the line is traced will always be easily determined. On the contrary, commentators have long recognised the difficulty of defining the frontier beyond which the general principles of law, including fundamental rights for which the European Court of Justice imposes respect, shall not apply. See esp. J Weiler, ‘The European Court at a Crossroads: Community Human Rights and Member State Action’, in *Du droit international au droit de l’intégration. Liber amicorum Pierre Pescatore* (Baden-Baden, Nomos Verlagsgesellschaft, 1987) 821; J Temple Lang, ‘The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles’, (1991) 2 *L.I.E.I.* 23; J Weiler, ‘Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights’, in N Neuwahl and A Rosas (eds), *The European Union and Human Rights* (The Hague-Boston-London, Martinus Nijhoff Publ., Kluwer, 1995) 56; and K Lenaerts, ‘Le respect des droits fondamentaux en tant que principe constitutionnel de l’Union européenne’, in *Mélanges en hommage à Michel Waelbroeck* (Bruxelles, Bruylant, 1999) 423.

¹² The expression is borrowed from S Leibfried and P Pierson, ‘Semi-sovereign Welfare States: Social Policy in a Multitiered Europe’, in S Leibfried and P Pierson (eds), *European Social Policy: Between Fragmentation and Integration* (Washington D.C.: Brookings Institution, 1995).

the level at which particular rules are to be adopted, but which is substantive, and defined as the freedom of one entity to choose how any particular issue will be governed.

If we accept this view, it is easy to see that the development of the EU may threaten fundamental rights in two ways. Clearly, the adoption of certain rules by the EU may lead to such rights being violated, either by those rules themselves, or by the EU Member States' measures of implementation. It is this risk that the case-law of the European Court of Justice initially sought to avoid¹³; and it is this risk, again, that the human rights vetting of the legislative proposals submitted by the European Commission and the inclusion of a fundamental rights dimension in the impact assessments accompanying legislative proposals seek to avoid.¹⁴ But the failure of the EU to adopt certain rules – or its failure, when it does adopt rules in a particular field, to ensure that these rules ensure an adequate level of protection of fundamental rights – may also threaten fundamental rights, because of the pressures which, in the single area the EU Member States now share, may create obstacles to the efforts the States may wish to pursue in order to protect and fulfil fundamental rights. It is on this premise, for instance, that the adoption of directives relating to the advertising, sponsorship, manufacture, presentation and sale of tobacco products was justified:¹⁵ when asked to confirm whether Article 95 EC could constitute an adequate legislative basis for the adoption of such instruments, the European Court of Justice agreed with the argument that a failure to act by the Union could result either in obstacles in the internal market, or in the absence of an adequate protection of the right to health through State regulation:

having regard to the fact that the public is increasingly conscious of the dangers to health posed by consuming tobacco products, it is likely that obstacles to the free movement of those products would arise by reason of the adoption by the Member States of new rules reflecting that development and intended more effectively to discourage consumption of those products

¹³ The fundamental rights protected by the European Court of Justice as general principles of law (and, now, by reference to Article 6(2) of the EU Treaty) apply to the acts of the EU institutions (see, e.g., Case 374/87, *Orkem v Commission* [1989] ECR 3283, para. 31), as well as to the acts of the EU Member States when they implement Union law (Case 222/84, *Johnston v Chief Constable of the RUC* [1986] ECR 1651) or when they rely on an exception allowed under Union law (see, e.g., Case C-112/00, *Schmidberger* [2003] ECR I-5659; or Case C-36/02, *Omega Spielhallen* [2004] ECR I-9609).

¹⁴ In April 2005, the Commission adopted a Communication by which it seeks to improve the compliance of its legislative proposals with the requirements of the Charter (Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005). On 15 June 2005, it adopted a new set of guidelines for the preparation of impact assessments (SEC(2005)791, 15.6.2005). Although the new guidelines are still, as were the former impact assessments (see Communication of the Commission on Impact Assessment, COM(2002)276 of 5.6.2002), based on a division between economic, social and environmental impacts, the revised set of guidelines pays much greater attention to the potential impact of different policy options on the rights, freedoms and principles listed in the EU Charter of Fundamental Rights (indeed, a specific report was commissioned by the European Commission (DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium): see EPEC, *The Consideration of Fundamental Rights in Impact Assessment. Final Report*, December 2004, 61 pages). On this question, see generally O De Schutter, 'Mainstreaming Human Rights in the European Union' in Ph Alston and O De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Oxford, Hart Publishing, 2005); and House of Lords European Union Committee, *Human rights proofing of EU legislation*, Report with evidence, HL Paper 67, 16th report of the session 2005-2006.

¹⁵ Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ L 194, 18.7.2001, p. 26); Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16).

by means of warnings and information appearing on their packaging or to reduce the harmful effects of tobacco products by introducing new rules governing their composition.¹⁶

On the surface, the Tobacco Manufacture and Advertising Directives aim at product standardisation in the internal market; in reality, their objective is to contribute to the protection of health, an objective which could not be achieved by the Member States acting individually. The reasoning behind the use of Article 95 EC for the adoption of these directives also justified, in particular, the adoption of the Personal Data Directive in 1995, which sought to strengthen the protection of the right to respect for private life in the processing of personal data throughout the Community on the basis that ‘the difference in levels of (...) the right to privacy, with regard to the processing of personal data afforded in the Member States, may prevent the transmission of such data from the territory of one Member State to that of another Member State’. The Preamble continued that this could result in ‘an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law’.¹⁷

In both cases, the intervention of the European legislator is justified by the growing tension between fundamental economic freedoms, such as the free movement of goods or the freedom to provide services, which are at the basis of the establishment of the internal market, and the development of national regulations, such as those relating to tobacco products or the processing of personal data, which aim at the protection of fundamental rights (the right to health and the right to privacy, respectively). The adoption of harmonised minimum levels of protection of these fundamental rights throughout the Union serves a dual function. First, it ensures that this conflict will not result in the creation of barriers within the internal market – which the EU Member States may be tempted to justify by the need to ensure a certain level of protection of fundamental rights within their territory. Second, it ensures that the high level of protection of fundamental rights certain Member States may be seeking to ensure will not be threatened by the need to recognise the primacy of economic freedoms of movement. In the cases cited, the failure by the Community to adopt directives relating to the advertising, sponsorship, manufacture, presentation and sale of tobacco products, or to the protection of personal data, might have resulted in the Member States being pressured to lower the level of protection of the right to health or the right to privacy, either because this would be seen as a requirement of the internal market (allowing the free movement of tobacco products, or the transborder flow of personal data in the provision of services across Member States), or because maintaining high levels of protection of those rights might result in placing the undertakings

¹⁶ Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.*, [2002] ECR I-11453, at para. 67. This position was confirmed in two judgments of 14 December 2004: Case C-434/02, *Arnold André GmbH & Co. KG v Landrat des Kreises Herford*, [2004] ECR I-11825; Case C-210/03, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11893. Comp. with Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-2247 (where the Court annulled Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1992 L 213, p. 9) since that Directive did not ensure free movement of products which are in conformity with its provisions, and therefore could not be said to contribute to the establishment of the internal market as required for Article 95 EC (then Article 100a of the EC Treaty) to be relied upon as a legal basis).

¹⁷ Preamble, 7th Recital, of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). This directive too is adopted on the basis of Article 100a of the EC Treaty (now Article 95 EC).

established on their territory in an unfavourable position vis-à-vis competitors established in other Member States with less demanding regulations.¹⁸

Nor is this reasoning limited to product or services regulation in the internal market. Consider, for example, the approach which has been taken towards asylum in the European Union. Asylum was identified as an issue of common interest once it was realised that, in the absence of a common approach, certain States may be ‘magnets’ for potential asylum-seekers arriving at the borders of the Union, because of the generosity of their reception of candidates for asylum. This situation was seen to contain the risk of regulatory competition between the EU Member States, as the growth in the number of asylum-seekers imposed financial burdens on the States to which they were most attracted, thus leading those States to lower the level of protection afforded to asylum-seekers. In the regulatory competition scenario, States would be competing with one another in order to afford the lowest level of protection possible: the conditions for such a regulatory competition are present, since States are free to lower the level of protection for asylum-seekers, although the choice by any one State to do so further increases the burden on the other States, resulting in a ‘race to the bottom’ in this field.¹⁹ It is this risk which the definition, at the level of the Union, of minimum standards in the field of asylum sought to avert. Thus, when the proposal was made for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, the development of minimum standards regarding the procedure for granting and withdrawing refugee status in the Member States was justified by the fact that the adoption of such standards ‘will help to limit secondary movements of asylum applicants as resulting from disparities in procedures in Member States. Henceforth, applicants for asylum will decide on their country of destination less on the basis of the procedural rules and practices in places than before. The continued absence of standards on the procedures for granting and withdrawing refugee status would have a negative effect on the effectiveness of other instruments relating to asylum. Conversely, once minimum standards on asylum procedures are in place, the operation of, inter alia, an effective system for determining which Member State is responsible for considering an asylum application^[20] is fully justified’.²¹

Many more such examples could be provided. At a minimum, they illustrate that, in certain well-defined circumstances, because of the interdependencies created between the EU Member States who share a single area in which goods, services, undertakings, and persons move freely, and in

¹⁸ See, in particular, on the risks of such ‘regulatory competition’, F Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford, Oxford University Press, 1999), chap. 3.

¹⁹ S Barbou des Places and B Deffains, ‘Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe’, (2004) 23 *International Review of Law and Economics* 345. See also S Barbou des Places, *Evolution of asylum legislation in the field of asylum. Insights from regulatory competition theory*, Working Paper of the European University Institute, Florence, RSC No. 2003/16, 37 pages.

²⁰ As provided for in the ‘Dublin II’ Regulation implementing the Dublin Convention of 15 June 1990 into European Community law: Council Regulation n° 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25.2.2003, p. 1, and Commission Regulation n° 1560/2003 laying down detailed rules for the application of Regulation n° 343/2003, OJ L 222, p. 3. For the initial proposal of the Commission, see COM(2001) 447, OJ C 304 of 10.10.2001, p. 192.

²¹ Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2000) 578 final of 20.9.2000, OJ C 62 of 27.2.2001, p. 231. The directive has now been adopted: Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326 of 13.12.2005, p. 13).

which national authorities, including police and judicial authorities, cooperate, the Union might have to adopt certain measures aimed at realising fundamental rights. The level of protection of such rights should not be left to market mechanisms: the implementation of these rights should not be a hostage to competition between jurisdictions, whether such competition follows from the need to attract foreign investors, or – for example – from the need not to become a magnet for asylum-seekers arriving at the borders of the Union.

Of course, the European Court of Justice has included fundamental rights among the general principles of law for which it ensures respect in the scope of application of the Treaties. The authorisation thus granted to the EU Member States to invoke fundamental rights in order to limit the extent of their obligations under these treaties is clearly necessary and welcome, since it ensures that the obligations imposed on the EU Member States under Union law will not systematically be recognised as a primacy above their human rights undertakings. As the next section shows, however, this may not be sufficient.

III. The impact of the fundamental rights jurisprudence of the European Court of Justice

Under the case-law of the European Court of Justice – and now, too, under the EU Treaty itself²² – the Member States may invoke fundamental rights as a justification for not complying with certain obligations imposed under Union law, whether such obligations follow from the establishment of the internal market²³ or from the establishment of an area of freedom, security and justice.²⁴ But this

²² The case-law of the European Court of Justice has been confirmed by Article 6(2) of the EU Treaty, according to which ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’.

²³ This possibility has been recognised by the European Court of Justice with respect to the permissible restrictions on the free movement of goods (Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24); Case C-112/00, *Schmidberger*, [2003] ECR I-5659) and on the free provision of services (Case 353/89, *Commission v. the Netherlands*, [1991] ECR I-4089 (para. 30) (judgment of 25 July 1991); Case 148/91, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, [1991] ECR I-513 (paras. 9 and 10)).

²⁴ Both under international law and under EU law, the national authorities are obliged to refuse to cooperate with the authorities of another member State where this would lead to a violation of a fundamental right. While this follows from the fundamental rights jurisprudence of the European Court of Justice referred to here, it is further confirmed by the ‘fundamental rights exception’ clauses inserted in the recent instruments adopted under Title VI EU, especially in those instruments which are based on the principle of mutual recognition. See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190 of 18.7.2002, p. 1), 12th Recital of the Preamble and Article 1, §3 (‘This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union’); Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196 of 2.8.2003, p. 45), Article 1, second sentence (stating that the framework decision ‘shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty’), as well as, with regard to the *ne bis in idem* principle, the observance of which may constitute a ground for non-recognition or non-execution, Article 7 §1, c); Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76 of 22.3.2005, p. 16), 5th and 6th Recitals of the Preamble as well as Articles 3 and 20 § 3 (‘Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions’); Council Framework

case-law offers an argument, not against the adoption of measures at European level in order to ensure the protection of fundamental rights, but instead in favour of such measures. It merely illustrates why the objectives of ensuring a uniform level of protection of fundamental rights throughout the Union (whether in the form of a harmonised level of protection or in the form of minimum safeguards), on the one hand, and of establishing an internal market and an area of freedom, security and justice, on the other hand, are perfectly complementary: as we saw in certain of the examples above, making the protection of fundamental rights uniform may be seen as an instrument for the achievement of an internal market and an area of freedom, security and justice, since, in the absence of the definition of such common standards, the Member States might be tempted to rely on the ‘fundamental rights exception’ to escape from their obligations under EU law.

Moreover, while this case-law allows the Member States to take measures necessary for the protection of fundamental rights under their jurisdiction, even though this may lead to obstacles in the internal market or in the mutual cooperation between national authorities in the area of freedom, security and justice, this authorisation is strictly circumscribed: while the Member States may act in order to fulfil the minimum requirements of fundamental rights, it is more doubtful whether they will be authorised to go beyond those minimum requirements in order to ensure a higher level of protection of fundamental rights than that which is strictly required. Therefore, once they seek to legislate in order to protect fundamental rights above the minimum levels imposed under their international commitments, the EU Member States may be found to violate their obligations under Union law, by imposing disproportionate restrictions on the free movement rights recognised under the EC Treaty, or by unjustifiably refusing to cooperate with the national authorities of the other Member States in the area of freedom, security and justice. And even if they are not found in violation of these obligations, they might discover that such measures – because they impose too heavy a burden on businesses, for instance, or because they are too generous to asylum-seekers – are hardly sustainable, in view of the pressures resulting from the fact that they share a common area with the other Member States, whose approach might be different in significant ways. Both these risks may be briefly commented upon.

A. The ‘Fundamental Rights Exception’ in the Case-Law of the European Court of Justice

It is not entirely clear under the current case-law of the Court whether the Member States are authorised to impose restrictions on the fundamental freedoms recognised in the EC Treaty in order to promote fundamental rights beyond the minimum requirements which are imposed by their international obligations, or beyond the understanding of human rights which is shared by all the Member States. In certain cases, Member States have been authorised to put forward the need to protect fundamental rights as a justification for restricting certain economic freedoms under the EC Treaty, although it was clear that the measure adopted was not a requirement under the international obligations of that State. This is exemplified by the case where the Netherlands was authorised to restrict the freedom to provide audio-visual services for the sake of preserving pluralism in the media, as a means to promote freedom of expression, although it could hardly be argued that this is a requirement under Article 10 of the European Convention on Human Rights.²⁵ The broad

Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59), 3rd Recital of the Preamble and Article 1, § 2.

²⁵ Case 353/89, *Commission v. Netherlands* [1991] ECR 4089 (para. 30); Case 288/89, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media* [1991] ECR 4007 (para. 23); Case 148/91, *Vereniging*

understanding of ‘human dignity’ which justified a restriction to the freedom to provide services in *Omega* is also a sign in this direction. In that case, the Court noted, remarkably, that it is ‘not indispensable (...) for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected’.²⁶

In other cases, however, the Court seems to allow for restrictions to be imposed on economic freedoms recognised under the EC Treaties in the name of the protection of fundamental rights, but only insofar as the measures do not go beyond what is necessary to that effect, which may be interpreted as prohibiting States from invoking this justification in order to go beyond their international obligations. In *Schmidberger*, the Court considered that a restriction to the free movement of goods may be justified by the need to respect the freedom of expression and the freedom of assembly of demonstrators, but only after noting that ‘the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted an unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public. The imposition of stricter conditions concerning both the site – for example by the side of the Brenner motorway – and the duration – limited to a few hours only – of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope’.²⁷ In a totally different domain, the case of *Albany International* may be mentioned, where the Court considered that Article 85 of the EC Treaty (now Article 81 EC) should not constitute an obstacle to the conclusion of collective agreements between management and labour, but only after noting that the agreement which was challenged as incompatible with the EC Treaty ‘establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration’²⁸ – the implication being that, if it were to go beyond the pursuance of social objectives recognised in the Agreement on social policy,²⁹ such a collective agreement might be found to violate the rules of the EC Treaty guaranteeing freedom of competition.

So we have, it would seem, two lines of case law. In some judgments the Member States may justify the imposition of certain restrictions on fundamental freedoms of movement (or on competition rules) insofar as they seek, by proportionate means, to fulfil the legitimate aim of promoting fundamental rights, even where their understanding of what fundamental rights require is particularly generous, and more generous, at least, than what constitutes the shared understanding of this requirement throughout the Union. By contrast, in other cases, the Member States are authorised to adopt such measures only to the extent that they are strictly necessary to comply with the minimum requirements of fundamental rights, and they may not choose to go beyond these minimum requirements. The above cases show that it matters where the line is drawn between the two situations. But the ambiguity of the Court on this issue is entirely understandable: only by preserving such ambiguity may the Court avoid being accused of prohibiting States from realising

Veronica Omroep Organisatie v. Commissariaat voor de Media, [1993] ECR 513 (paras. 9 and 10); and see, more recently, Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24).

²⁶ *Omega*, para. 37.

²⁷ Case C-112/00, *Schmidberger*, paras. 89-90.

²⁸ Case C-67/96, *Albany International BV* [1999] I-5751 (para. 63).

²⁹ OJ 1992 C 191, p. 91.

fundamental rights under their jurisdiction, while at the same time not creating the impression that, as long as any particular state measure is even remotely related to this objective, it would justify restrictions being imposed on the fundamental economic freedoms of the EC Treaty, or on other obligations imposed on the EU Member States under Union law.

B. 'Regulatory Competition' in the Field of Fundamental Rights: the Reality of the Risk

A related, yet distinct problem is that the fundamental rights case-law of the European Court of Justice may not suffice to ensure that having the level of protection of fundamental rights determined by the Member States will effectively check against the risk of 'regulatory competition', broadly defined here as the risk that, in the absence of a common approach to the implementation of certain rights, market forces will lead the EU Member States to lower the level of protection of those rights. Whether States may be pressured to renounce affording a generous level of protection of fundamental rights, not because of legal prohibitions, but because of the interdependencies which result from the fact that they belong to a common area with the other EU Member States, should be examined on a sector-by-sector basis, and any generalisations on this issue should be treated as highly suspect.

While it is not possible here to offer a general overview of the situations where the said risk is present in order to identify whether the case-law of the European Court of Justice offers a sufficient safeguard against its materialisation, the example of rights entailing important public expenditures, such as education or health care, warrants specific consideration.³⁰ The problem in the field of education is well known.³¹ In the face of the risk of being obliged to accept students from any other EU Member State where the conditions for access to certain higher education studies may be more restrictive, the national authorities may be tempted to impose certain conditions for having access to particular studies or levels of education, or they may impose conditions for the attribution of loans or maintenance grants, which may be found to constitute discrimination on grounds of nationality prohibited by Article 12 EC. A number of members of the Court, from AG Slynn in his Opinion in *Gravier*³² to AG Geelhoed in *Bidar*,³³ have recognised some legitimacy to the 'free rider' argument – or the 'benefit-tourism' argument – according to which 'students moving abroad to study reap the benefits from publicly funded education provided in other Member States but do not contribute to its financing via national taxes, nor necessarily 'pay back' by staying to exercise their professional life in the host State'.³⁴

³⁰ For more detailed explorations of these issues, see the collection of essays in M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Oxford and Portland, Hart Publishing, 2005).

³¹ In doctrine, see, inter alia, J-CI Scholsem, 'A propos de la circulation des étudiants: vers un fédéralisme financier européen?', (1989) 3/4 *Cahiers de Droit Européen* 306; AP Van der Mei, *Free Movement of Persons Within the EC – Cross-border Access to Public Benefits* (Hart Publishing, Oxford, 2003); G Davies, 'Welfare as a Service' (2002) 29 *L.I.E.I.* 27.

³² Case 293/83, *Gravier* [1985] ECR 593, at 604.

³³ Case C-209/03, *Bidar* [2005] ECR I-2119 (paras. 65-66 of the opinion).

³⁴ According to the characterisation of the argument by AG Jacobs in his opinion in Case C-147/03, *Commission v. Austria* [2005] ECR I-5969 (at para. 36 of the opinion).

In the field of health care, the Court has recognised since the cases of *Kohll* and *Decker*,³⁵ and later of *Vanbraekel*,³⁶ that ‘it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier [to the freedom to seek the provision of medical services in another State than one’s State of residence, or to the freedom to buy pharmaceutical products in that other State, while benefiting from the social security protection of the State of residence]’.³⁷ It has been argued that the two sectors present such dissimilarities that the *Kohll-Decker* case-law developed as regards the provision of medical services or the free movement of medical products should not be extended to other sectors such as education.³⁸ However, given that similar arguments are made about the need to ensure that the Member States will be able to maintain a financial equilibrium in the provision of certain social goods, the Court seems to be moving towards a roughly uniform approach to these questions. The Court does, of course, exclude any discrimination on grounds of nationality in the scope of application of the EC Treaty, but it is not insensitive to the argument that, in certain cases, the Member States may have to protect the financial equilibrium of their educational or health care system, in order to be able to continue to afford high levels of protection of the right to education or the right to health.

In *Commission v Austria*, Austria argued that certain measures aimed at restricting access to Austrian universities for holders of diplomas awarded in other Member States should not be considered to constitute discrimination under Article 12 EC, since it would be justified by the consideration that ‘the number of students [in particular coming from Germany] registering for

³⁵ Case C-158/96, *Kohll* [1998] ECR I-1931 (where a Luxembourg national challenged the refusal of the Luxembourg authorities to reimburse dental treatment sought for his daughter in Germany, despite the fact that this had been recommended by his doctor, since receiving the same orthodontist treatment in Luxembourg would have required a longer waiting time); C-120/95, *Decker* [1998] ECR I-1831 (where the Court was asked to decide whether the imposition of a prior authorisation for the purchase of a medical product abroad – in that case, a pair of spectacles with corrective lenses – was compatible with the rules of the EC Treaty pertaining to the free movement of goods). See further on these cases n. 49 hereunder.

³⁶ Case C-368/98, *Vanbraekel* [2001] ECR I-5363 (concerning a Belgian national who sought orthopaedic surgery in France for a disease in his knees, despite the initial refusal by the sickness fund to grant the authorisation sought in the absence of a supporting opinion from a doctor practising in a national university institution, as was required under Belgian law, and who thereafter sought to be reimbursed: the European Court of Justice took the view that the level of reimbursement was to be defined by the competent (home) State, rather than according to the legislation of the host State).

³⁷ *Kohll*, para. 41; *Decker*, para. 39; *Vanbraekel*, para. 47. See V Hatzopoulos, ‘Killing national health and insurance systems but healing patients? The European market for health-care services after the judgments of the ECJ in *Vanbraekel* and *Peerbooms*’, (2002) 39 *CMLRev* 683; AP Van der Mei, ‘Cross-Border Access to Health Care within the European Union: Some Reflections on Geraets-Smits and Peerbooms and *Vanbraekel*’, (2002) 9 *MJ* 1; or, for broader perspectives on the significance of treating health care as services and medical products as goods circulating freely within the internal market, see Y Jorens, ‘The Right to Health Care Across Borders’, in R Baeten, M McKee and E Mossialos (eds), *The Impact of EU Law on Health Care Systems* (Brussels, PIE Peter Lang, 2003); and, especially, T Hervey and J V McHale, *Health Law and the European Union* (Cambridge, Cambridge Univ. Press, 2004), chap. 4 (Access to health care services).

³⁸ See the Opinion of AG Jacobs in Case C-147/03, *Commission v. Austria* [2005] ECR I-5969, paras. 33-34. AG Jacobs noted that, in contrast to health care, education has not been considered to constitute a ‘service’ in the meaning of Article 49 EC; furthermore, Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59) and, more recently, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 (OJ 2004 L 158, p. 77), allow the EU Member States to protect themselves from an influx of students from other Member States (at least when they have not legally resided in their territory for a continued period of five years), since such students may be excluded from being entitled to maintenance aid for studies consisting in student grants or student loans.

courses in medicine could be five times the number of available places, which would pose a risk to the financial equilibrium of the Austrian higher education system and, consequently, to its very existence'.³⁹ In response, the Court confirmed its previous case-law,⁴⁰ which is in principle hostile to the imposition of discriminatory conditions for access to higher education studies. Yet the Court did not say that the Austrian argument was not legitimate or could not be accepted in principle.⁴¹ Rather, it took the view that, in this specific case, the Austrian authorities had not provided sufficient evidence that 'the existence of the Austrian education system in general and the safeguarding of the homogeneity of higher education in particular would be jeopardised'⁴²: the contested measures, it appeared, were adopted on a preventive basis, rather than in order to react to an actual influx of students from other Member States (in particular Germany), and the disproportion between the number of applicants and the places available was not quantified, except for the courses in medicine.

Therefore, the Court does not exclude the possibility that a State might be able to justify the adoption of measures that would otherwise be discriminatory towards students from other EU Member States, where the threat to the balance of the educational system (and, in particular, its financial viability) would be actual rather than potential, insofar as such safeguard measures would be strictly necessary to respond to such a threat. Indeed, only six months earlier, in *Bidar*,⁴³ the Court had noted that 'although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States (...), it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'.⁴⁴ It therefore considered it legitimate for a Member State to grant assistance covering the maintenance costs of students only to students who had demonstrated a certain degree of integration into the society of that State, for example through a condition of being a resident for a number of years in that State, as long as such a condition is transparent, is proportionate to the aim pursued, and is not impossible to fulfil by a national of another Member State.

³⁹ Case C-147/03, *Commission v. Austria* [2005] ECR I-5969, para. 64. As summarised by AG Jacobs, the argument of Austria was that the central aim of its education policy 'is to grant unrestricted access to all levels of studies. That policy choice is meant to improve the percentage of Austrian citizens with a higher education qualification, which, according to Austria, is currently amongst the lowest in the EU and the Organisation for Economic Co-operation and Development ('OECD'). Bearing that objective in mind, if the conditions of access to higher education applicable in other Member States are not taken into consideration, there is a risk of the more liberal Austrian system being flooded by applications from students not admitted to higher education in more restrictive Member States. That influx would entail serious financial, structural and staffing problems and pose a risk to the financial equilibrium of the Austrian education system and, consequently, to its very existence [such a risk being] mainly posed by German applicants who have failed to fulfil the required conditions to access certain university studies in Germany' (see paras. 26-27 of the opinion).

⁴⁰ Case C-65/03, *Commission v Belgium* [2004] ECR I-6427.

⁴¹ The Court itself imposed that, as citizens of the Union, even students should in principle benefit from the requirement of non-discrimination on grounds of nationality imposed by Article 12 EC, and thus should be afforded the same social advantages as those afforded to the nationals in the States in which they pursue their studies. See Case C-184/99 *Grzelczyk* [2001] ECR I-6193 (where the Court took the view that, since Directive 93/96 aims at preventing students from becoming an 'unreasonable' burden on the public finances of the host Member State, it therefore 'accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'); see also Case C-224/98, *D'Hoop* [2002] ECR I-6191.

⁴² Para. 66.

⁴³ Case C-209/03, *Bidar* [2005] ECR I-2119.

⁴⁴ Para. 56.

The Court did not agree with the argument, put forward in *Bidar* by the United Kingdom, that Member States should be authorised to ‘ensure that students’ parents have contributed sufficiently, or that the students themselves are likely to make a sufficient contribution to the public finances through taxation in order to justify maintenance assistance being granted’⁴⁵ – an argument which, if accepted, would not only threaten the social compact between the EU Member States, but also potentially within each State.⁴⁶ However, neither is the financial solidarity which may be imposed between the Member States unlimited. The Court appears to accept that certain measures could be adopted by the Member States in order to ensure that their educational systems will not be threatened in their viability by the pressure exercised on them by students from other Member States.

These cases show that the European Court of Justice has not been indifferent to the risk that, due to the impact of the exercise of the fundamental economic freedoms recognised in the EC Treaty, the Member States may experience difficulties in maintaining a high level of protection of fundamental rights under their jurisdiction. The challenge the development of EU law thus poses to the ability of the Member States to protect fundamental rights is quite distinct in kind from the classical situation where a rule of EU law would impose on the EU Member States obligations which cannot be reconciled with their human rights obligations under international or national constitutional law, confronting them with conflicting obligations. It does not present itself as a conflict between two norms. It is a limitation of fact, rather than a legal prohibition. Here, EU law does not impose a restriction on the acceptability of the Member States generously subsidising higher education, or reimbursing medical products; rather, it protects certain economic freedoms, and it imposes a rule of non-discrimination on grounds of nationality whose scope of application has been expanding spectacularly during the last decade.⁴⁷ But this results in a *de facto* limitation on what the State may be willing to provide to its citizens, without running the risk of its social security or its educational system becoming bankrupt. The fear which is classically expressed is that the Member States may be prohibited from adopting certain measures because, while they might have been intended to protect fundamental rights, they may be found to go too far, and to result in disproportionate restrictions to economic freedoms protected under the EC Treaty; cases such as *Kohll* or *Decker* in the field of health care, for instance, exemplify this risk.⁴⁸

⁴⁵ Opinion of AG Geelhoed in *Bidar*, para. 65.

⁴⁶ AG Geelhoed noted in his opinion in *Bidar* that ‘if it is taken to its logical conclusion, this argument implies that if parents have not contributed to taxation or only made a modest contribution, their children would not be eligible for maintenance assistance, whereas students whose parents have contributed significantly would be entitled to such assistance. It does not seem probable that the United Kingdom would seriously accept the social discrimination inherent in this position’ (para. 65).

⁴⁷ One very significant step in this development was Case C-85/96, *Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.

⁴⁸ In *Kohll*, cited above at n. 35, the Court concludes that Articles 59 and 60 of the EC Treaty preclude national rules such as Article 20 of the Luxembourg Codes des Assurances Sociales (Social Insurance Code) and Articles 25 and 27 of the statutes of the Union des caisses de maladie (UCM) under which reimbursement, in accordance with the scale of the State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State is subject to authorisation by the insured person’s social security institution. Implicitly relying on the need to protect the right of access to health care, Luxembourg and other intervening governments argued that the requirement of prior authorisation constituted the only effective and least restrictive means of controlling expenditure on health and balancing the budget of the social security system. However, while recognising that the EC Treaty permits Member States to restrict the freedom to provide medical and hospital services ‘in so far as the maintenance of a treatment facility or medical service on national territory is essential for the public health and even the survival of the population’ (para. 51), the Court took the view that

But, as the examples above show, we also have situations where Member States are free to adopt the measures through which fundamental rights are being promoted, but where, as they seek to do so, they discover they are now semi-sovereign: the preservation of their formal power to make progress is of little use to them, since they may only be generous towards their population to the extent that the requirement of solidarity with the other Member States does not result in such generosity becoming unaffordable: subsidising higher education in order to make it affordable to all categories of students, for instance, may be allowable in principle, yet such a policy may also lead to attracting students from other Member States seeking to benefit from this advantage, creating a risk to which the State concerned may find it difficult to react.

IV. Beyond markets and hierarchies: learning

It would require a far more detailed and systematic study to propose a catalogue of situations where the problems outlined above may arise. And nothing in the above should be interpreted as an empirical statement about the probable consequences of fundamental rights being protected at the level of each Member State, rather than at the level of the Union. Interjurisdictional competition may or may not be beneficial to the realisation of fundamental rights. It would be naïve to think, for instance, that the level of protection of workers in one Member State would necessarily be determined, or even decisively influenced, by the fear of Member States that certain businesses might seek to relocate elsewhere if they impose too far-reaching (and costly) requirements;⁴⁹ or that the national debates regarding the processing of asylum claims and the treatment of asylum-seekers are pre-empted by the risk of a State becoming a magnet for asylum-seekers. The outcomes of national decision-making processes depend on a large set of variables, among which the attitudes adopted by the other EU Member States may not weigh significantly. And a number of examples could be imagined where it is because the Member States are free to legislate on certain matters that our common understanding of fundamental rights is allowed to progress, through the very same channels – the pressure on national regulators resulting from regulatory developments in other Member States – which, in other cases, give rise to the fear that regulatory competition operates to the detriment of fundamental rights.⁵⁰

the rules at issue had not been demonstrated to be ‘necessary to provide a balanced medical and hospital service accessible to all’, or that they were ‘indispensable for the maintenance of an essential treatment facility or medical service on national territory’ (para. 52). Those rules, therefore, were not justified on grounds of public health. In the companion case of *Decker*, also cited above at n. 35, the Court declared that national rules under which a social security institution of a Member State refuses to reimburse to an insured person on a flat-rate basis the cost of a pair of spectacles with corrective lenses purchased from an optician established in another Member State, on the grounds that prior authorisation is required for the purchase of any medical product abroad, are precluded under Articles 30 and 36 of the EC Treaty. That conclusion followed from the admission by the Luxembourg government that the reimbursement at a flat rate of the cost of spectacles and corrective lenses purchased in other Member States would have no effect on the financing or balance of the social security system. In both cases, therefore, there was a conflict between national rules ostensibly portrayed as seeking to protect the right to health care, and the freedom to provide service or the free movement of goods as protected in the EC Treaty; that conflict was resolved in favour of the economic freedoms of the Treaty, in the absence of a demonstrated impact of those freedoms on the ability of the State to effectively protect the right to health.

⁴⁹ In fact, the idea that the conditions are created in the EU for a ‘race to the bottom’ in the area of social rights has been seriously questioned: C Barnard, ‘Social dumping and the race to the bottom: some lessons for the European Union from Delaware?’, (2000) 25 *E.L.Rev.* 57.

⁵⁰ Certain situations are difficult to interpret, in the absence of a clear consensus on what represents ‘progress’ or ‘regression’ in the field of fundamental rights. When the Netherlands and Belgium partially decriminalised active euthanasia in 2001 and in 2002 respectively, this created the possibility for patients residing in other Member States to travel to those countries in order to benefit from the provision of such a medical service. In that context, one is left to

The claims which are made here are more modest. A first claim is that – whether the consequences are deemed generally negative or positive – the establishment of the internal market and of an area of freedom, security and justice may influence the fundamental rights policy of the Member States, whether by limiting their ability to adopt certain measures for the protection and the promotion of fundamental rights, or by incentivising them to adopt such measures when confronted with the examples of other jurisdictions.

A second claim is normative: it is that the influence thus exercised through market mechanisms, i.e. through interjurisdictional competition, should be made the subject of an open deliberation, both at European and at national levels, in order for its negative impacts to be limited (and if possible altogether avoided), and for its positive potential to be maximised. The current situation is deeply unsatisfactory. While, under the existing treaties, the European Community or the European Union may rely on a number of legal bases in order to legislate in the field of fundamental rights,⁵¹ there exists no mechanism through which the exercise of these powers could be made more responsive to the actual need for such an intervention. In other words, rather than being based on a systematic monitoring of the impact on fundamental rights of European integration – which would require a regular comparison of the evolution of fundamental rights in the different EU Member States – the actions adopted in this area respond to the rhythm of crises or of national political agendas, with the consequence that the sequences are *ad hoc* and reactive, rather than systematic and proactive. More importantly, in situations where there is a need for coordination, but where no legislative powers have been attributed to the Union, there exists no channel of communication between the Member States which would allow such coordination to take place.

wonder whether the prohibition of euthanasia in other EU Member States still has a significance other than at the symbolic level, or for the residents in those States who cannot afford to travel abroad to seek euthanasia there.

⁵¹ It is unnecessary to draw up an exhaustive list of such legal bases. But a number of examples may be given. It is on the basis of Article 13 EC, now revised by the Treaty of Nice, that the Council adopted Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.7.2000, p. 22) and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000, p. 16). On the basis of Article 18 EC, which seeks to facilitate the exercise of the right of every citizen of the Union to move and reside freely, the European Parliament and the Council adopted Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77). Acting on the basis of Articles 63 and 64 EC, the Council adopted Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3/10/2003, p. 12) and Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers (OJ L 31 of 6/2/2003, p. 18). And it is on the basis of Article 31 EU that the European Commission proposed the adoption of a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (COM(2004) 328 final, 28.4.2004). For other attempts to identify a list of competences which are attributed to the European Union and which could be relied upon to adopt instruments implementing fundamental rights in the EU legal order, see EU Network of Independent Experts on Fundamental Rights, Position paper on the Human Rights Agency, 16 December 2004 (fn. 15); O De Schutter and Ph Alston, 'Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency', in Ph Alston and O De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Oxford, Hart Publishing, 2005), pp. 1-24; O De Schutter, 'The Implementation of Fundamental Rights through the Open Method of Coordination', in O De Schutter and S Deakin (eds), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of Social Europe?* (Bruxelles, Bruylant, 2005), pp. 279-343.

How such mechanisms should be conceived, and what forms such coordination should take, are the questions addressed in the following sections. The hypothesis of this paper is that, whether or not certain competences have been attributed to the EU to legislate in any particular domain, the fundamental rights policies of the EU Member States may require better coordination, and that exchanges of information may have to become more systematic and organised. This should serve not only to guide the exercise of competences of the Union where such competences exist – thus allowing a more rigorous justification of the interventions of the Union under the principles of subsidiarity and proportionality – but also, in the absence of any legal powers of the Union to act, to require from each Member State that it provide an explanation about its initiatives in a particular area which may impact on the other Member States, or from which the other Member States may learn.

In order to identify the forms of such mechanisms promoting collective learning in the field of fundamental rights, three examples may serve as a source of inspiration. A first example is the reaction which followed the *Kohll* and *Decker* judgments of 1998 concerning the provision of medical services across borders and the free movement of pharmaceutical products. These cases forced the Member States to confront the question of the relationship between these economic freedoms and the financial equilibrium of their social security schemes (A below). A second example is the attempt to introduce an open method of coordination ('OMC') in the fields of asylum and immigration (B below). A third example is the strategy recently developed by the European Union on the rights of the child (C below). These examples all serve to illustrate the move, in the area of fundamental rights, to open methods of coordination between the Member States, as an attempt to escape the dilemma between the risks of regulatory competition and the difficulties of harmonisation. Learning by monitoring, thus, becomes an alternative to both markets and hierarchy. But it is not simply a 'third way', or a form of compromise, between the branches of the previous alternatives: rather, it illustrates the emergence of a post-regulatory, non-formalistic mode of governance, which represents a gain in reflexivity. While the question of whether action should be taken at Member State level or at Union level remains relevant, the decisive question becomes whether any action, adopted at either of these levels, may be reasonably justified, in the light both of the existing interdependencies between the Member States and of the need to take into account each Member State's experiences in addressing any particular issue.⁵²

A. Health Care and Economic Freedoms

After the Court delivered the *Kohll* and *Decker* judgments,⁵³ certain commentators were alarmed that this case-law could have an impact on the stability and financial equilibrium of national health insurance systems. The home Member States, where the patients reside, might find it difficult to regulate the consumption of health care and, thus, the level of public spending on health. For host Member States providing health services or medical products to patients from other Member States, the influx of patients from abroad could be unmanageable and could limit the availability of health care for local residents who might be subject to longer waiting periods. Further, where the influx of foreign patients is attributable to a higher standard of service, this could result in a pressure to lower the quality of the service provided. In addition, 'States calculate their health care needs by reference

⁵² I am indebted to the work made in this direction by Chuck Sabel and Jonathan Zeitlin (see CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', unpublished draft, March 2007 (on file with the author)).

⁵³ See above, nn. 35 and 49.

to their populations. Too much movement of patients might result in overburdening of some hospitals, and corresponding underuse of others, possibly leading to closures. This could jeopardise the social principle of effective health care accessible to all, which underpins the national health (insurance) systems of all Member States. The ability of patients to access (and be reimbursed for) innovative treatments that might not be recognised as reimbursable within their home state may imply a loss of control over the reimbursement of such new and “unproven” treatments’.⁵⁴ Although they state that these risks have in fact been mostly exaggerated, T Hervey and J McHale conclude from their careful examination of the effect of EU law on national health care systems that:

the dynamic of the impact and application of (deregulatory) internal market law (...) may render some aspects of the entitlements of patients under national health care policies not formally unlawful, but not viable in practice. This may arise, for instance, from the financial drain placed on national policies by requiring non-discriminatory treatment of all [EU citizens or migrant workers], or because of the loss of control over supply implied by freedom to provide and receive welfare goods and services across frontiers. Control over supply is a classic mechanism for ensuring control over welfare costs, including health care costs, in all Member States.⁵⁵

The reaction to this situation has been to organise a form of coordination between the EU Member States, designed to limit the risks of negative impacts and to maximise the positive impacts of EU law – the freedom to provide medical services across borders and the free movement of medical products – on the provision of health care.⁵⁶ In June 2002, the Health Council, recognising ‘the emerging interaction between health systems within the European Union particularly as a result of the free movement of citizens, and their desire to have access to high quality health services’, expressed its concern that the rules of the internal market should be compatible with the principles of solidarity, equity and universality, which are common to the health systems of the EU Member States. Therefore, it considered that ‘there is added value in examining certain health issues from a perspective that goes beyond national borders’ and that ‘there is a need to strengthen cooperation in order to promote the greatest opportunities for access to health care of high quality while maintaining the financial sustainability of health care systems in the European Union’, especially in the context of the enlargement of the European Union. It was therefore decided to launch a high-level reflection process which the Commission could develop in close cooperation with the Council and all the Member States, in order to identify how the issue of the impact of EU Law on the health care systems of the Member States could be managed.⁵⁷

Following this invitation, the Commission convened a ‘High-Level Process of Reflection on Patient Mobility and Healthcare Developments in the EU’ in 2003. The reflection group was composed of government ministers and a limited number of key stakeholders. In December 2003, it produced a set of nineteen recommendations on cross-border health care purchasing and provision, health professionals, European centres of reference, health technology assessment, information and e-

⁵⁴ T Hervey and JV McHale, *Health Law and the European Union*, cited above, 139.

⁵⁵ *Id.*, 156.

⁵⁶ See, in particular, T Hervey and JV McHale, *Health Law and the European Union*, cited above, chap. 10; T Hervey, ‘The European Union and the Governance of health care’, in G de Búrca & J Scott, *Law and New Governance in the EU and the US* (Oxford, Hart Publishing, 2006), also available on: eucenter.wisc.edu/OMC/Papers/Protection/hervey.pdf

⁵⁷ Health Council, 26 June 2002, EU Council doc. 10090/02 (Presse 182).

health, health impact assessment and health systems, and patient safety.⁵⁸ The report of the patient mobility reflection process was largely seen to illustrate the potential value of European cooperation in helping Member States to achieve their health objectives. In its follow-up communication to the report of the high-level reflection process,⁵⁹ the Commission hailed this as a ‘political milestone’⁶⁰ and emphasised the benefits from cooperation between the Member States in this field, noting that ‘it is clear from existing variations in techniques, resources and outcomes that there is enormous scope to improve the results obtained from existing resources by bringing health care across the Union towards the standard of the best’.⁶¹

One of the recommendations of the high-level reflection process to the Commission was to consider the development of ‘a permanent mechanism at EU level to support European cooperation in the field of health care and to monitor the impact of the EU on health systems, and to bring forward any appropriate proposals’. In response, the Commission established a High-Level Group on Health Services and Medical Care. This group started work shortly afterwards, in July 2004. It brings together experts from all the Member States, and reports annually to the Employment, Social Policy, Health and Consumer Affairs Council of the EU. Its work is divided into seven main areas, including cross-border health care purchasing and provision. In this field, the Group’s focus is on examining ‘the financial impact and sustainability of cross-border health care, developing a framework that could be used for cross-border health care purchasing, studying the reasons for mobility and the need for purchasing care abroad, providing information to patients on quality, safety and continuity of care as well as on patients’ rights and responsibilities, considering liability issues in cross-border care, and gathering information to monitor cross-border health care purchasing and provision’.⁶²

In addition, in April 2004 the Commission presented a communication proposing a new extension of the open method of coordination – which had already been experimented with in the areas of pensions, social inclusion and employment as part of the Lisbon process launched in 2000 – to health care and long-term care.⁶³ The communication proposed ‘common objectives for the development and modernisation of health care provision and funding’, which would ‘allow Member States to define their own national strategy and benefit from the experiences and good practices of the other Member States’.⁶⁴ As in other contexts, the open method of coordination which the communication envisaged was presented as ‘a flexible tool, respecting the diversity of the national situations and competences’. The method proposed was based on the identification of joint objectives – accessibility, including universal access, quality, and financial sustainability – allowing both the comparison between the different reforms and the development of joint indicators favouring

⁵⁸ High-Level Reflection Group, High-Level Reflection Process on Patient Mobility and Healthcare Developments in the European Union HLPR/2003/16, 9 December 2003.

⁵⁹ Communication of the Commission, ‘Follow-up to the high-level reflection process on patient mobility and health care developments in the European Union’, COM (2004) 301 final of 20 April 2004.

⁶⁰ At 18.

⁶¹ At 6-7.

⁶² According to the summary provided on the website of the European Commission.

⁶³ Communication from the Commission, ‘Modernising social protection for the development of high-quality, accessible and sustainable health care and long-term care: support for the national strategies using the ‘open method of coordination’’, COM(2004) 304 final of 20.4.2004.

⁶⁴ At 4.

exchanges of experiences. It also comprised a participatory dimension, since, according to the communication, ‘a key to the development and reform of the systems is their ability to implement effective governance based on involving and giving responsibility to the players concerned – including the social partners, regional and local authorities, patients and civil society – and coordinating care providers, financial organisations, NGOs and the public authorities’.⁶⁵

B. Asylum and Immigration: From the Open Method of Coordination to Mutual Information

A second illustration of such a development, leading to the reliance on new modes of governance in the implementation of fundamental rights, is in the field of asylum and immigration. The EU was first attributed powers in the fields of asylum and immigration through the Treaty of Maastricht of 1992. This provided for the possibility of intergovernmental cooperation in these areas under Title VI of the EU Treaty, then titled ‘Justice and Home Affairs’. In 1997, the Treaty of Amsterdam transferred asylum and immigration to the European Community – the so-called ‘first pillar’ of the EU – although these areas did retain certain specificities, in particular as regards the role of the European Court of Justice. The Treaty of Amsterdam entered into force on 1 May 1999. A range of legislative initiatives were adopted, especially following the Tampere European Council of 15-16 October 1999, which called for the development of a common EU asylum and immigration policy to include partnership with countries of origin; a common European asylum system which should lead in the longer term to a common asylum procedure and a uniform status for those granted asylum; fair treatment of third country nationals; and the more efficient management of migration flows.⁶⁶ While the legislative programme was being launched in the months following the Tampere European Council, the European Commission proposed to complement that approach by another, based on softer forms of coordination between the Member States rather than on the adoption of new legislative instruments under Articles 61-69 EC.

The debate was opened by two separate communications adopted by the European Commission in 2001. In the field of immigration, the initial proposal was to launch an open method of coordination as a means of reflecting the multidimensional aspects of migratory phenomena, the large number of different actors involved and the main responsibility of the Member States in this area. The objective of an OMC was to coordinate the application of the proposed European legislation in the Member States – and to supplement the common policy that emerges as a result – in order to help ensure the further, coherent development of the key components of a common immigration policy in line with joint rules. Concretely, the open method of coordination proposed was to lead to the adoption by the Council of ‘multiannual guidelines for the Union accompanied by specific timetables for achieving the goals which they set in the short, medium and long term’. These guidelines, which were to be revised on an annual basis in the framework of the open method of coordination, were then to be translated into national policy by the setting of specific targets, which would allow for account to be taken of national and regional differences.⁶⁷

Recourse to an open method of coordination in this field was justified not only by the need to ensure the harmonious implementation of the EU instruments adopted in the field of immigration, and to

⁶⁵ At 4.

⁶⁶ SN 200/99 Presidency Conclusions of the Tampere European Council 15-16 October 1999.

⁶⁷ Communication from the Commission to the Council and the European Parliament on an open method of coordination for the Community Immigration Policy, COM(2001) 387 final of 11.7.2001.

evaluate the impact of those instruments in the Member States (in order, possibly, to revise those instruments), but also by three distinct arguments.⁶⁸ First, while the initiatives adopted by each Member State affect all the other Member States, ‘Member States remain responsible for a number of significant issues particularly with respect to the admission of economic migrants and for developing and implementing integration policy’. There is, therefore, a gap between the reality of the interdependency of national policies on the one hand, and the existing allocation of competences on the other hand; and one of the objectives of the new OMC consisted in ‘the identification and development of common objectives to which it is agreed that a European response is necessary’. Second, immigration should not be dealt with in a purely technocratic way, but requires instead input from a large range of stakeholders, since it raises ‘many sensitive and far-reaching issues which directly affect civil society and which need to be discussed openly, at both national and European levels, in order to reach a consensus on policy positions’. Third, there is the sheer complexity of the matter (what the Commission also refers to as its ‘interdisciplinarity’), which implies that no ready-made solutions exist to the problems which an immigration policy should tackle: ‘the international nature of migration flows and the interconnection between different aspects of migration policy necessitate a procedure by which progress in realising the common European objectives can be evaluated and the objectives adapted as necessary’. The iterative nature of this process, whereby objectives are progressively revised in the light of their implementation, is characteristic of the pragmatist approach to problem-solving, in which knowledge and action in the world are intrinsically linked to one another.

In the field of asylum, another communication adopted during the same period argued that the adoption of legislation was to be complemented by the adoption of European guidelines, on the basis of which national action plans were to be prepared by the Member States; by an improved coordination of national policies, and the exchange and promotion of best practices; by the monitoring and evaluation of the impact of Community policy; and finally, by the organisation of regular consultations with third countries and international organisations.⁶⁹

However, these proposals were met with scepticism.. The fear was expressed, in particular, that such open methods of coordination might become a substitute for the implementation of a programme of legislative measures.⁷⁰ The Commission therefore put forward, as an alternative, a proposal to enhance mutual information of national immigration and asylum policies between Member States’ policy-makers with the creation of a mutual information procedure on planned national asylum and immigration measures.⁷¹ It thus retreated to a more modest approach, based exclusively on information collecting and pooling. The more recent proposal is justified by the consideration that:

⁶⁸ Communication from the Commission to the Council and the European Parliament on an open method of coordination for the Community Immigration Policy, COM(2001) 387 final of 11.7.2001, at p. 5.

⁶⁹ Communication from the Commission to the Council and the European Parliament on the Common Asylum Policy, introducing an open coordination method, COM(2001) 710 final, of 28.1.2001. This had already been anticipated by the Communication on the common asylum procedure and uniform status (COM(2000)755 final, of 22.11.2000).

⁷⁰ See Opinion of the Economic and Social Committee on the Communication from the Commission to the Council and the European Parliament on an open method of coordination for the Community Immigration Policy (COM(2001) 387 final), and on the Communication from the Commission to the Council and the European Parliament on the Common Asylum Policy, introducing an open coordination method (COM(2001) 710 final), OJ C 221 of 17.9.2002, p. 49, at paras. 3.6. and 5.1.1.

⁷¹ See Proposal for a Council Decision on the establishment of a mutual information procedure concerning Member States’ measures in the areas of asylum and immigration, COM(2005) 480 final of 10.10.2005.

Member States will (...) benefit from the proposed information procedure, as they will be able to obtain a better knowledge of other Member States' policies and will be in a position to improve coordination between them. Member States could have the possibility to know other Member States' views, if an exchange of views takes place on a given draft national measure, before the latter becomes adopted legislation. Finally, the negotiation of new EU legislation will also be enhanced, as a result of better coordination of national policies and increased mutual knowledge and confidence.

Under this new scheme, the Member States are expected to 'communicate to the other Member States and to the Commission measures [legislative, administrative and judicial] which they intend to take in the areas of asylum and immigration, at the latest when they are made public', to the extent that those measures are 'susceptible of having an impact on other Member States or on the Community as a whole'. The information thus transmitted will be made available to all the other Member States through a web-based network run by the Commission, making it possible for any Member State or the Commission to request additional information on a particular measure. The outcome is described thus:

A particular national measure may also be the object of an exchange of views, with the presence of the Member State whose measure is the object of an exchange of views, the Commission and all other Member States wishing to participate. The purpose of such an exchange of views is the identification of problems of common interest; therefore, discussions will not lead to any voting, nor will they result in any kind of recommendations to the Member State concerned.

The main change to what was proposed in 2001 is that the burden facing the Member States will be much lighter. The States are not expected to prepare national action plans or strategies on the basis of guidelines set at European level. Indeed, no guidelines or recommendations will be addressed to the Member States. By contrast to the traditional open method of coordination, the system for 'mutual information' of the Member States envisaged here is designed solely to ensure that there is a swift exchange of views where developments in one Member State might be seen as having a sufficiently significant impact on the other Member States, so as to justify the need for coordination measures to be examined.

C. The EU Strategy on the Rights of the Child

In July 2006, the European Commission presented a communication proposing an EU strategy on the rights of the child.⁷² The strategy is based on the idea that 'the EU's obligation to respect fundamental rights, including children's rights, implies not only a general duty to abstain from acts violating these rights, but also to take them into account wherever relevant in the conduct of its own policies under the various legal bases of the Treaties (mainstreaming)'.⁷³ While the Commission recognises that the EU has no general competence to promote the rights of the child, and that any

⁷² COM(2006) 367 final, of 4.7.2006.

⁷³ At 3.

initiative should respect the principles of subsidiarity and proportionality, it notes that the EU may add value to the implementation of the UN Convention on the Rights of the Child, since it can ‘support the Member States in their efforts, both by assisting them, in certain areas, in taking into account the rights of the child in their actions, and by providing a framework for mutual learning, within which the Member States can identify and adopt the many good practices to be found across the Union. Such an approach, based on broad and coordinated action, would add value to the efforts of the Member States and would strengthen recognition of and respect for the principles of the UNCRC, both within the Union and beyond’.⁷⁴

The strategy proposes a number of transversal actions in order to ensure that children’s rights are taken into account in EU legislation and policies.⁷⁵ Some of these actions have little added value. For instance, the Commission proposes to ensure that ‘all internal and external EU policies respect children’s rights in accordance with the principles of EU law, and that they are fully compatible with the principles and provisions of the UNCRC and other international instruments’. But compliance with the rights of the child is already a requirement imposed both under the EU Charter of Fundamental Rights and in the case-law of the European Court of Justice; and a methodology has already been agreed with a view to ensuring that such compliance is effectively verified. It is difficult to see what, precisely, the Commission intends to add to this mechanism.

Other initiatives, however, have greater potential. First, the Commission proposes collecting comparable data from the EU Member States, the Council of Europe, the ChildONEurope Network, and the EU Fundamental Rights Agency, in order to identify the need for further EU action in this field. This demonstrates a willingness to pursue an active policy geared towards the promotion of the rights of the child – not simply to comply with these rights by avoiding committing violations, but also to realise them where a comparative assessment of the situation of the rights of the child leads to the conclusion that, within the limits of its competences, the Union may contribute to improving their level of protection.

Second, the the Commission emphasises the need for mechanisms promoting mutual learning and the exchange of good practices, as well as improved coordination of the different actions of the EU in this field. More precisely, the Commission proposes to bring all relevant stakeholders together – including ‘the Member States, the UN agencies, the Council of Europe, civil society and children themselves’ – in a European Forum for the Rights of the Child. This forum should ‘contribute to the design and monitoring of EU actions and act as an arena for exchange of good practice’. The work of the forum should be supported by a web-based discussion and work platform. Within the Commission itself, coordination should be improved by the establishment of a formal inter-service group on the rights of the child, and by the appointment of a Commission Coordinator for the Rights of the Child, both of which should be entrusted with the implementation of the strategy.

The strategy on the rights of the child proposed by the Commission is both complementary to, and presents some areas of overlap with, developments which have already been taking place,

⁷⁴ At 6.

⁷⁵ The Communication also proposes a series of specific actions, such as EU child helplines and hotlines for missing and sexually exploited children, support to the banking sector and credit card companies in combating the use of credit cards for the purchase of sexual images of children on the internet, the launch of an action plan on development cooperation to address children’s priority needs in developing countries, and the promotion of a cluster of actions on child poverty across the European Union. These actions, however, need not detain us here.

informally, at intergovernmental level. Indeed, a Permanent Childhood and Adolescence Intergovernmental Group, called L'Europe de l'Enfance, was established under the French presidency of the second semester of 2000.⁷⁶ It brings together, on an informal basis, the Ministers of the EU countries⁷⁷ or high-level government officials with responsibility for childhood policies. Since its creation, L'Europe de l'Enfance has been seeking to promote comparisons between the Member States and to identify best practices. The Ministers responsible for childhood occasionally adopt conclusions, which remain at a very general level, but which nevertheless may be seen as an attempt to arrive at a common understanding of the priorities in improving the situation of children and of the need to take children into account in the design and implementation of EU laws and policies.⁷⁸

In order to support L'Europe de l'Enfance, a scientific body was established to develop studies and to exchange and compare data on childhood and adolescence.⁷⁹ This European Network of Centres and Observatories on Childhood was called ChildONEurope. It was officially launched in Florence in January 2003. Its proclaimed aims are to exchange knowledge and information on laws, policies, programmes, statistics, studies, research and best practices regarding childhood and adolescence, and on methodology and indicators, in order to obtain comparability of information and to undertake comparative analysis about specific subjects. ChildONEurope has worked on issues such as adoption, comparing the Member States' approaches, for instance, to allowing adopted children access to information about their origins or to the assistance given to adoptive families. It has also worked on family mediation. It has analysed the concluding observations of the Committee of the Rights of the Child, the expert body monitoring compliance with the Convention on the Rights of the Child, which have been addressed to the EU Member States. ChildONEurope's working methods rely heavily on the completion of questionnaires by the participating observatories.⁸⁰

While certain of the transversal measures proposed in the EU strategy on the rights of the child concern only the internal workings of the Commission (for instance, the establishment of mechanisms to improve the coordination between the services of the Commission, or to systematise the assessment of the impact on the rights of the child), other measures clearly seek to involve the Member States, and may have implications for the allocation of tasks between the Member States and the EU. These measures may raise two sets of concerns. First, by the establishment of a European Forum for the Rights of the Child, the Commission may be seen as seeking to regain the initiative in a field which, since 2000, has been partly pre-empted by L'Europe de l'Enfance.⁸¹ The fact that the Commission's communication on the rights of the child was initially announced for

⁷⁶ See Annex I to the Communication of the Commission, 'Towards an EU Strategy for the rights of the child', at para. 3.2.

⁷⁷ Initially, in meetings called 'European Meetings of Ministers for Children's Affairs'; now called 'Meeting of the EU Ministers responsible for Childhood'.

⁷⁸ See the Brussels Declaration adopted on 9 November 2001; and the Lucca Declaration adopted following the meeting of 25-26 September 2003.

⁷⁹ All the information in this paragraph is from the website of ChildONEurope: www.childoneurope.org (last visited on 20 March 2007).

⁸⁰ In June 2006, these covered 9 EU Member States. 14 other Member States were 'associated members', it being understood that 'the latter may decide to form part of the Network at any given time by nominating a national institution able to furnish official public data on the condition of children and adolescents'.

⁸¹ See Annex I to the Communication of the Commission, 'Towards an EU Strategy for the rights of the child', at para. 3.2.

adoption in 2005 in the Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (adopted in June 2005 and which both the Commission and the Council had agreed to),⁸² does not allay that suspicion, since that Action Plan did not, of course, anticipate precisely which proposals the communication should contain. However, much more important may be a second concern: that the implementation of an EU strategy on the rights of the child such as that proposed by the Commission might lead to an unjustified expansion of the competences of the EU in fields which, hitherto, had fallen under the responsibility of the Member States.

For our purposes, two aspects of the unfolding EU strategy on the rights of the child stand out. First, most of the initiatives proposed are not legislative: they relate to the establishment of governance mechanisms which should improve coordination between the Commission's services and between the Member States, because the implementation of such initiatives does not require the existence of legal bases in the treaties. Second, these mechanisms seek to promote collective learning, through the exchange of experiences. As was observed by one member of the UK House of Commons, during the debate held before the House of Commons European Standing Committee on 18 December 2006, the main advantage of the strategy is that it will oblige all of the actors to reflect on their practice: 'To stand back and consider who is doing what, particularly in an EU context, is extremely valuable because there is a great deal of good practice throughout Europe that we could all learn from. We can provide that practice and we can also learn from others'.⁸³ These two dimensions are linked, of course, since coordination methods as exemplified by the new strategy on the rights of the child ensure that the intervention of the Union will add value, without resulting in any transferral of competences from the Member States to the Union, or in the exercise by the Union of competences which it shares with the Member States. Indeed, it is only under the condition that they do not result in a reallocation of tasks between the Union and the Member States that such coordination methods have any chance of being politically acceptable.⁸⁴

V. The Implementation of Fundamental Rights through 'New Governance' Approaches

As the developments above illustrate, the European Commission and the EU Member States are seeking to enhance the contribution of the European Union to the protection and promotion of fundamental rights by means other than recourse to legislation. Some of these initiatives have failed: this is the case, for instance, as regards the open method of coordination proposed in the fields of asylum and immigration in 2001. Others have been short-lived: the High-Level Group on Health Services and Medical Care in practice functioned only for one year. Others still have an uncertain

⁸² Council of the EU, doc. 9778/2/05, 10 June 2005 (under the heading 1.2. Respect for and active promotion of fundamental rights).

⁸³ Statement by Mrs. Curtis-Thomas, House of Commons, 18 December 2006.

⁸⁴ See, e.g., the statement by Mr Rammell, the United Kingdom Minister for Higher Education and Lifelong Learning, during the debate held before the House of Commons already referred to: 'It is good that the Union is encouraging member states to promote and protect children's rights, but that is true only to the extent that the Commission's proposals add real value and stay within the scope of the Union's existing competences; otherwise, we run the risk of removing the power to take decisions about safeguarding children from those who are best placed to make those decisions, and the Government will certainly not allow that to happen. We also run the risk of detracting from intergovernmental arrangements that already work well. (...) [W]hile there is a role for the EU in sharing best practice, monitoring what is happening and adding value, particularly in terms of asserting and pushing children's rights internationally, there is no EU competence in the field of children's rights. (...) The issue is about coordinating, adding value and forcefully upholding member states' primary responsibility to assert and implement children's rights'.

future. The techniques chosen are varied. Their common characteristic, however, is that the means chosen are non-hierarchical and do not take the form of the adoption of binding legislation. Rather, they lead to the establishment of governance mechanisms whose main purpose is to ensure a systematic exchange of information between the Member States. The Member States remain primarily responsible for the design and implementation of the policies concerned. But they agree to report back to their peers, and to exchange their experiences, either in order to identify where an intervention from the Union might be justified, or to improve their understanding of the problem they are facing and the tools they have at their disposal to solve it, which may have already been tested in another jurisdiction. The establishment of the Fundamental Rights Agency will most probably result in a systematisation of this practice in the future.⁸⁵ It is therefore important to evaluate both the potential and the limits of this development in our understanding of the role of the EU in the area of fundamental rights.⁸⁶

It is important to emphasise from the outset that the developments described above – and any future systematisation of such ‘new governance’ approaches to fundamental rights that could take place at the initiative of the Fundamental Rights Agency – should not be seen merely as the development, in yet further domains, of the open methods of coordination which already exist in a number of other fields.⁸⁷ While this scenario could be worth exploring – indeed, a number of the OMCs already in place may be seen as related to the implementation of certain economic and social rights – the canonical form of the OMC, as described in the Conclusions of the Lisbon European Council of March 2000⁸⁸ (the adoption of guidelines by the Council and the adoption by the Member States of action plans (or national reform programmes) implementing those guidelines), risks being seen as both too burdensome for the Member States and too intrusive. It is not realistic, politically, to expect that further OMCs will be launched in the future: on the contrary, the tendency today is to streamline the existing OMCs and to rationalise the reporting process they are associated with. That is not to say, of course, that the critiques which have been addressed to the development of OMCs since the start of the decennium – or, indeed, the critiques levelled at any attempt to extend the OMC to fundamental rights⁸⁹ – are irrelevant here. Rather, whatever processes are put in place should

⁸⁵ See above, text corresponding to notes 3-5.

⁸⁶ Certain efforts have already been made in this direction. See N Bernard, ‘A ‘New Governance’ Approach to Economic, Social and Cultural Rights in the EU’, in T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective* (Oxford, Hart Publishing, 2003); G de Búrca, ‘New Modes of Governance and the Protection of Human Rights’ in P Alston and O De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Oxford, Hart Publishing, 2005); O De Schutter, ‘The Implementation of Fundamental Rights through the Open Method of Coordination’, cited above at n. 51.

⁸⁷ For a recent attempt to catalogue the existing fields in which OMC processes have been inaugurated, see E Szyzszak, ‘Experimental Governance: The Open Method of Coordination’, (2006) ELJ 486.

⁸⁸ Although it has many different incarnations across a variety of policy fields, the open method of coordination was given a definition by the Conclusions of the Lisbon European Council of 23-24 March 2000, which described it as ‘a means of spreading best practice and achieving greater convergence towards the main EU goals’ and as involving ‘fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms; establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice; translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences; periodic monitoring, evaluation and peer review organised as mutual learning processes’ (para. 37 of the Presidency Conclusions).

⁸⁹ See, e.g., K Armstrong, ‘The OMC and fundamental rights: a critical appraisal’ (2005) available at <http://eucenter.wisc.edu/OMC/Papers/Rights/armstrong.pdf> (contribution to a seminar on this question held at Columbia University on 4 November 2005, under the framework of the REFGOV project).

facilitate mutual learning and improved coordination between the Member States in the area of fundamental rights. Such processes should not merely replicate the existing OMCs but should draw lessons from past experiences, and avoid repeating the mistakes which have been made in those other areas.⁹⁰

Any attempt to evaluate the reliance on new modes of governance such as those described above in the field of fundamental rights should start with the question of whether the other tools we have at our disposal are sufficient. It is submitted that they are not. The development of EU law, as we have seen, may have an impact on the realisation of fundamental rights at national level, without the necessary competences having been transferred to the EU which would allow for the adoption of harmonisation measures. Such an impact should be identified, and the primary objective of the processes described above is to allow for such an identification. If necessary, a response should be found in improved coordination of the Member States' approaches to any particular question where the answers provided by any one Member State may influence the answers the other Member States could offer. The case-law of the European Court of Justice has, of course, authorised, on an *ad hoc* basis, the Member States to fulfil certain fundamental rights even where this leads to restrictions being imposed on certain fundamental economic freedoms recognised under the EC Treaty, or to protect fundamental rights which would be threatened by the development of the area of freedom, security and justice, but this case-law is ambiguous about the degree of freedom it allows to the Member States, and it is no adequate substitute for a deliberative process, between the Member States, as to the common approach they should be adopting towards a particular question of common interest.

Moreover, even where the adoption of legislative measures would be possible, under either the EC Treaty or the EU Treaty, in order to ensure the approximation of the national legislation of the Member States, some form of mutual observation by the Member States remains useful. First, it may serve to inform the Member States about the need for an intervention of the EU, and thus lead to a more genuine justification of such intervention under the principles of subsidiarity and proportionality which should guide the EU in the exercise of the powers it has been allocated. In that sense, instead of leading to a 'reverse competence creep' – such as may occur where an OMC is relied upon in order to justify not transferring further competences to the EU to further the integration project or not exercising legislative competences which have been transferred⁹¹ – systematic exchanges of information between the Member States about the situation of fundamental rights under their jurisdiction and about the initiatives they are taking in that field may serve to highlight the need for the adoption of EU legislation in the face of divergences that are too widespread. This might be the case where such divergences could threaten the unity of the internal market or the mutual trust on which the area of freedom, security and justice is based.

Second, such exchanges of information may serve to identify solutions which have been experimented with successfully in one or a few Member States, and could be generalised to all

⁹⁰ For a thorough attempt to evaluate, at an empirical level, the effectiveness of the open method of coordination, see the collection of essays in J Zeitlin and Ph Pochet (eds), *The Open Method of Co-ordination in Action. The European Employment and Social Inclusion Strategies* (Bruxelles-Bern-Berlin-Frankfurt am Main-New York-Oxford-Wien, P.I.E. Peter Lang, 2005). For an excellent summary of the risks associated with the reliance on the OMC, see V Hatzopoulos, 'Why the Open Method of Coordination (OMC) is bad for you: a letter to the EU', (2007) 3 ELJ 309.

⁹¹ See the discussion of this risk by V Hatzopoulos, 'Why the Open Method of Coordination (OMC) is bad for you: a letter to the EU', cited above.

Member States. While there may be relatively widespread agreement about what should not be done in order for fundamental rights not to be violated, it is typically much more difficult to achieve a consensus on what should be done, positively, in order to protect and promote fundamental rights: which conditions have to be created in order to ensure that fundamental rights are fully realised remains contested and uncertain. In many cases, the existing international human rights law, even complemented by the case-law of international courts or expert bodies or by the existing standards or guidelines, will not be sufficient to guide policy-makers. What is required – beyond compliance with the minimum requirements set by international human rights – is a search for the best practices, by the pooling of the relevant information and the evaluation of existing attempts to give meaning to the rights at stake.

It has sometimes been argued that due to considerations of comity for other international organisations – or, indeed, under an enriched understanding of the requirement of subsidiarity⁹² – the Union should not take action where standards have been developed under other international forums in which the EU Member States also participate. This is an important argument, but it is not necessarily decisive. Precisely because one of the outcomes of mutual information processes in the area of fundamental rights may be an initiative leading to the adoption of EU legislation, only the organisation of such processes within the Union may serve that purpose. In addition, the need for collective action may exist even in the presence of international instruments which provide certain minimum safeguards in the field concerned. First, the commitments of the Member States may be variable under those instruments, so that it should be verified, in each situation, what the common undertakings are which would make the adoption of a measure by the Union desirable and justified. Arguably, in the presence of variable commitments of the EU Member States under international human rights instruments,⁹³ the Union should act in order to ensure that such differences will not

⁹² See Parliamentary Assembly of the Council of Europe (PACE), doc. 10894 (11 April 2006), Follow-up to the Third Summit: the Council of Europe and the Fundamental Rights Agency of the European Union, Report to the Committee on Legal Affairs and Human Rights rapp. Mr Erik Jurgens), at para. 31: ‘What is clearly missing from the EU definition of subsidiarity (...) is the relationship between EU action and the activities of other international organisations, notably those with an essentially intergovernmental structure such as the Council of Europe’. See also paras. 11.9 and 11.10 of Recommendation 1744 (2006) of the PACE, based on that report.

⁹³ While it not possible in the context of this article to be systematic, this may be illustrated by the situation of the EU Member States vis-à-vis the Council of Europe instruments. Apart from the European Convention on Human Rights, and leaving aside instruments such as the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CETS n°126) which create mechanisms of protection rather than add substantive standards, the main human rights instruments of the Council of Europe are: the European Social Charter of 1961 and the Revised European Social Charter of 1996 (CETS n°35 and n°163 respectively); the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981 (CETS n°108); the Framework Convention for the Protection of National Minorities of 1995 (CETS, n°157); the Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine (Convention on Human Rights and Biomedicine) of 1997 (CETS n°164); as well as the additional protocols to those instruments. The principles of the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data have been developed and extended in European Community law, especially through the adoption of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. As to the other instruments adopted within the Council of Europe in the field

create barriers in the internal market, distort competition, or threaten the mutual confidence on which mutual cooperation is based in the area of freedom, security and justice. Second, international human rights instruments typically impose a minimum level of protection, which may be low in comparison to the level of protection which certain Member States may be willing to provide.⁹⁴ Therefore, unless an initiative is taken at the level of the Union, they may be led to legislate just in order to ensure that minimum level of protection imposed under their international commitments, either out of fear that any attempt to go beyond this will lead to disproportionate interferences with certain freedoms recognised under the EC Treaty, or in order to avoid having to shoulder the burden of granting certain advantages which, for instance, they will not be authorised to deny to the citizens of the Union exercising their freedom of movement, or which may endanger the competitiveness of businesses established on their territory.

In sum, the development of mutual exchanges of information between the EU Member States in the field of fundamental rights may serve three complementary functions: (1) it may facilitate coordination between the Member States where there exists no legal basis for the adoption of common rules; (2) it may facilitate the exercise of any competence which has been attributed to the EC/EU in this field, thus both depoliticising subsidiarity – by limiting the risk of the requirements of subsidiarity and proportionality being instrumentalised and, in particular, put in the service of the domestic agendas of the Member States – and repoliticising it – by leading to a debate on whether there is a need for an intervention by the Union; and (3) whether or not the recourse to legislation constitutes an alternative, it may encourage a learning process between the EU Member States which has the potential to improve their approach to the implementation of fundamental rights.

A robust scepticism has emerged within part of the legal doctrine about the proliferation of OMC processes in the EU. Certain authors have questioned the effectiveness of these processes; others regret that these processes move EU law away from its traditional methods of government, possibly disrupting the institutional balance in favour of the Member States, and away from the more integration-oriented actors (the Commission, the European Parliament, or the European Court of Justice). Some of these criticisms will not apply, however, where similar mechanisms are put in place in order to contribute to the implementation of fundamental rights. First, it has already been

of human rights, the level of acceptance of these different instruments by the EU Member States still varies relatively widely. On 1 January 2007, for instance, while all the Member States are parties either to the 1961 European Social Charter or to the 1996 Revised European Social Charter, Austria, the Czech Republic, Denmark, Germany, Greece, Hungary, Latvia, Luxembourg, Poland, Slovakia, Spain and the United Kingdom had not ratified the Revised European Social Charter. And both within the 1961 and the 1996 European Social Charters, the commitments of the States parties are variable, as they may, upon ratification, accept only a limited number of the provisions of these instruments. Belgium, France, Greece and Luxembourg have not ratified the Framework Convention for the Protection of National Minorities. Belgium, Finland, France, Germany, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Sweden and the United Kingdom have not ratified the Convention on Human Rights and Biomedicine.

⁹⁴ For example, when the Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data was proposed, all the EU Member States were already parties to the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data. However, this convention – a number of provisions of which are relatively vague and which, in any case, is generally not directly applicable – was considered to define an excessively low standard of protection. The Preamble of the Directive now states that its provisions ‘give substance to and amplify’ those contained in the Council of Europe Convention (11th Recital).

mentioned that the OMC is only one possible (and perhaps the most demanding) form that new modes of governance could take in the future in the field of fundamental rights.

Neither the adoption of guidelines at European level nor the preparation, on a regular basis, of national action plans or programmes implementing those guidelines, is necessary for an effective collective learning mechanism to exist. The organisation of exchanges on the basis of reports presented by each Member State about how a particular issue is being addressed, in principle, should be sufficient for this limited purpose. In fact, to a large extent, it is this kind of exchange which the Commission sought to promote, in a range of areas which includes citizenship and fundamental rights, when it presented its communication on the evaluation of the EU policies on freedom, security and justice.⁹⁵

Second, even if we were to move beyond mere exchange of information – towards the adoption of guidelines and the preparation of reports on their implementation – this would be facilitated in the area of fundamental rights by three sets of circumstances. First, international human rights instruments encourage the EU Member States to adopt national strategies or action plans,⁹⁶

⁹⁵ COM(2006) 332 final, of 28.6.2006. The mechanism proposed in the communication, which is explicitly distinguished from a new OMC, consists in the Member States providing the Commission with information about the implementation of EU policies in the fields of freedom, security and justice, by the regular delivery of ‘factsheets’ (one for each policy area), describing the achievements of each Member State on the basis of a relevant set of indicators. Such factsheets should be communicated twice every five years, since they will focus on ‘slow-moving outputs and results and on medium-term data’ (at para. 35). The information contained in these factsheets would be commented upon by the relevant stakeholders. The Commission would then prepare an ‘evaluation report’, including certain political recommendations. Finally, where justified, an ‘in-depth evaluation report’ would be prepared by the Commission in specific areas (paras. 18-33).

⁹⁶ In the Vienna Declaration and Programme of Action of 1993, the World Conference on Human Rights recommended that ‘each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights’ (World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, 14–25 June 1993, A/Conf.157/23, para. 71). The UN human rights treaty bodies have repeatedly encouraged States to use this tool in order to better protect and promote human rights. Thus, the Committee on Economic, Social and Cultural Rights adopted General Comment n°15 (2002), *The right to water (arts. 11 and 12)*, adopted at the twenty-ninth session of the Committee on Economic, Social and Cultural Rights, Geneva, 11–29 November, E/C.12/2002/11, para. 26, requiring States to adopt ‘... a national water strategy and plan of action to realise this right’; in General Comment n°14 (2000), *The right to the highest attainable standard of health (art. 12)*, adopted at the twenty-second session of the Committee on Economic, Social and Cultural Rights, Geneva, 25 April–12 May 2000, E/C.12/2000/4, para. 56, the Committee encourages States to establish ‘... national mechanisms for monitoring the implementation of national health strategies and plans of action’ including ‘... provisions on the targets to be achieved and the time-frame for their achievement ...’; General Comment n° 11 (1999), *Plans of action for primary education (art. 14)*, adopted at the twentieth session of the Committee on Economic, Social and Cultural Rights, Geneva, 26 April–14 May 1999, E/C.12/1999/4, para. 8-10, requiring States to adopt a detailed plan which ‘... must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge, under article 14’. The Committee on the Rights of the Child, similarly, adopted General Comment n° 5 (2003), *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, adopted at the thirty-fourth session (Geneva, 19 September–3 October 2003, CRC/GC/2003/5, in paras. 28-36 of which it recommends States to develop a ‘... comprehensive national strategy or national plan of action for children’ (para. 29); such a plan should set out ‘specific goals, targeted implementation measures and allocation of financial and human resources’ (para. 32). In its *General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, adopted on 17 August 2005 at its sixty-seventh session, the Committee on the Elimination of Racial Discrimination recommended that States should ‘implement national strategies or plans of action aimed at the elimination of structural racial discrimination’ and ‘entrust an independent national institution with the task of tracking, monitoring and measuring progress made under the national plans of action ...’ (advanced unedited version, at 2.1, paras. 9-10). The Committee on the Elimination of Discrimination against Women adopted General Recommendation 24 (1999), *Women and Health (art.12)* in which it recommends that ‘States parties should implement a comprehensive national strategy to

framework legislation, indicators and benchmarks, all of which contribute to what may be called the governance of fundamental rights in order to ensure their progressive realisation.⁹⁷ Therefore, the adoption of such action plans and indicators measuring progress, if they were to be encouraged by an EU-led initiative, might be more easily accepted than in fields where no similar obligations already exist.

Second, the participatory dimension of any OMC-like process would be greatly facilitated by the fact that a number of EU Member States have already set up independent and pluralistic institutions for the promotion and protection of human rights, where the relevant stakeholders are represented or with whom they cooperate⁹⁸; and by the existence of a wide range of non-governmental organisations which have the expertise and willingness to contribute to the process.

Third, while there is both disagreement and uncertainty about how best to implement fundamental rights in particular settings – and indeed, the processes referred to here are justified precisely because of the need to make explicit such disagreements and to overcome such uncertainties – there is agreement at least on a set of common values, embodied in the EU Charter of Fundamental Rights, and which all the Member States proclaim to adhere to. The existence of such a consensus can greatly facilitate any deliberative processes which are organised in order to arrive at a common understanding of whether the adoption of initiatives by the Union is both possible and desirable, or whether, in the absence of such an intervention, the Member States should coordinate themselves in order to move in a common direction. Although this consensus is largely superficial, and is situated at the level of general rhetoric rather than concrete substance, it does allow the deliberative processes which might be organised between the Member States to focus on implementation: it is under the guise of seeking to understand how best to implement the common values that the concrete significance of these values can be progressively unpacked and then revised in the light of the implementation itself.

VI. Conclusions

Rights are to be proclaimed and, once proclaimed, to be guaranteed by courts. We have come to realise, however, that this is not enough. Rights are also to be implemented; policies must be adopted in order to realise them. In the multilevel governance system of the European Union, where the task of realising rights is shared between the European Union and the Member States, there is a great risk that where the adoption of legislation is impossible at European level for legal or political reasons, the implementation of rights at the level of the Member States will respond to the classic mechanisms of regulatory competition, made only slightly more acceptable by the existence of a

promote women's health throughout their lifespan' (paras. 29-31). I am grateful to G de Béco for having provided me with these references.

⁹⁷ See, inter alia, C Raj Kumar, 'National Human Rights Institutions: Good Governance Perspectives on Institutionalisation of Human Rights' (2003) 19 *American University International Law Review* 259.

⁹⁸ The human rights treaty bodies have emphasised the important contribution such institutions may play in the protection of human rights. See, e.g., Committee on Economic, Social and Cultural Rights, General Comment n° 10 (1998), *The role of national human rights institutions in the protection of economic, social and cultural rights*, adopted at the nineteenth session of the Committee (Geneva, 16 November–4 December 1998), UN doc. E/C.12/1998/25 and Committee on the Rights of the Child, General Comment n° 2 (2002), *The role of independent national human rights institutions in the promotion and protection of the rights of the child*, adopted at the thirty-second session of the Committee (Geneva, 13-31 January 2003), UN doc. CRC/GC/2002/2. See also World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, 14–25 June 1993, A/Conf.157/23, para. 36.

common acquis of the EU Member States under international and European human rights law. The development of mechanisms organising a form of collective learning between the EU Member States allows us to think beyond hierarchies and markets. It proposes an answer based on deliberation about the reality of interdependencies between States. It is the hope of this author that the Fundamental Rights Agency will see this as its main challenge ahead.

